CIMB Bank Bhd v Nagappan a/l Pakirie & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 24NCVC-2945–11 OF 2011
ZABARIAH MOHD YUSUF J
28 FEBRUARY 2012

Civil Procedure — Costs — Award of costs — Plaintiff paid costs by issuing cheque in joint names of defendants — Whether costs should be payable to solicitors or to parties to action

Civil Procedure — Declaration — Application for — Whether declaratory order sought was hypothetical or academic

Civil Procedure — Judgment and orders — Order made by Court of Appeal — Whether plaintiff had complied with order with regard to costs to be paid to defendants — Whether plaintiff acted contrary to order by paying costs to defendants instead of paying to solicitors

The plaintiff appealed against the decision of the sessions court granting the defendants summary judgment. The Court of Appeal dismissed the plaintiff's appeal with costs of RM5,000, ie with costs to the defendant ('the order'). The plaintiff paid the costs by way of a cheque in favour of the defendants. The defendants returned the cheque and requested that the cheque be cancelled and a fresh cheque be issued in the name of the legal firm representing the defendants ('the firm'). However, the plaintiff refused to accede to this request. Thereafter, the defendants issued a notice to inform the plaintiff that if it failed to issue a cheque in the firm's name, the defendants would enforce the judgment against the plaintiff for non-compliance with the order made by the CA. The plaintiff responded by returning the cheque to the defendants. It was the plaintiff's case that it had complied with the order, with regard to the costs to be paid to the defendants, by issuing the cheque in the defendants' name. By way of the present originating summons application the plaintiff sought a declaration that it had complied with the order made by the CA and an injunction to restrain the defendants from proceeding with execution proceedings. The sole issue for determination in this case was whether the plaintiff had complied with the order with regard to the costs to be paid to the defendants.

Held, allowing the application with costs of RM5,000:

(1) The plaintiff had clearly complied with the order made by the CA that

was recorded as 'appeal dismissed with costs', when it made payment via cheque in the joint names of the defendants. The defendants' letter instructing the plaintiff to make payment to the defendants in the name of the firm was a mere request that was subject to the goodwill between the parties. Thus, even if the payment was made to the firm, as requested that too would not have been contrary to the order made by the CA. However, as the plaintiff had already issued the cheque in the name of the defendants' the request to reissue a fresh cheque was not agreeable to it. Therefore, it was wrong for the defendants to submit that the plaintiff had not paid the costs as ordered by the Court of Appeal (see paras 18 & 23).

(2) The fact that the defendants did not have a joint account was an afterthought. In any event, the fact that the defendants' did not have a joint account could be easily remedied by opening one with the bank (see paras 19–20).

(3) The declaratory order the plaintiff sought in the present case was not hypothetical or academic, because the defendants' threat of enforcing the order made by the CA was real. As such, this court allowed the present application with costs of RM5,000 and such costs to be set off with what was granted as costs by the order made by the CA (see paras 22 & 25).

[Bahasa Malaysia summary

Plaintif merayu terhadap keputusan mahkamah sesyen yang memberikan kepada defendan-defendan penghakiman ringkas. Mahkamah Rayuan ('MR') menolak rayuan plaintif dengan kos sejumlah RM5,000, iaitu dengan kos kepada defendan ('perintah'). Plaintif membayar kos tersebut melalui cek dibayar kepada defendan-defendan. Defendan-defendan memulangkan cek tersebut dan memohon bahawa cek tersebut dibatalkan dan cek baru dikeluarkan atas nama firma undang-undang yang mewakili defendan-defendan ('firma'). Walau bagaimanapun, plaintif menolak daripada menyetujui kepada permohonan ini. Defendan-defendan kemudiannya mengeluarkan notis untuk memberitahu plaintif bahawa jika ia gagal untuk mengeluarkan cek atas nama firma, defendan-defendan akan menguatkuasakan penghakiman terhadap plaintif kerana tidak mematuhi perintah yang dibuat oleh MR. Plaintif membalas dengan memulangkan cek kepada defendan-defendan. Adalah kes plaintif bahawa ia telah mematuhi perintah tersebut, berkaitan kos-kos yang akan dibayar kepada defendan-defendan, dengan mengeluarkan cek tersebut di atas nama defendan-defendan. Melalui permohonan saman pemula ini plaintif memohon perisytiharan bahawa ia telah mematuhi perintah yang dibuat oleh MR dan injunksi untuk menghalang defendan-defendan daripada meneruskan dengan pelaksanaan prosiding. Satu-satunya isu untuk penentuan

dalam kes ini adalah sama ada plaintif telah mematuhi perintah tersebut berkaitan kos-kos yang akan dibayar kepada defendan-defendan.

Diputuskan, membenarkan permohonan dengan kos RM5,000:

(1) Plaintif jelas mematuhi perintah yang dibuat oleh MR yang telah direkodkan sebagai '*appeal dismissed with costs*', apabila ia membuat bayaran melalui cek atas nama bersama defendan-defendan. Surat defendan-defendan mengarahkan plaintif untuk membuat bayaran kepada defendan-defendan atas nama firma adalah semata-mata permohonan yang tertakluk kepada nama baik di antara pihak-pihak. Oleh itu, walaupun bayaran dibuat kepada firma, seperti yang diminta ia juga bukan bertentangan kepada perintah yang dibuat oleh MR. Walau bagaimanapun, memandangkan plaintif telah mengeluarkan cek atas nama defendan-defendan, permohonan untuk mengeluarkan semula cek baru tidak dipersetujui oleh plaintif. Oleh itu, adalah salah untuk defendan-defendan untuk berhujah bahawa plaintif tidak membayar kos-kos seperti yang diperintahkan oleh Mahkamah Rayuan (lihat perenggan 18 & 23).

(2) Fakta bahawa defendan-defendan tidak mempunyai akaun bersama adalah sesuatu yang difikirkan kemudian. Walau bagaimanapun, fakta bahawa defendan-defendan tidak mempunyai akaun bersama boleh diremedikan dengan mudah dengan membuka akaun dengan bank (lihat perenggan 19–20).

(3) Perintah perisytiharan dipohon di dalam kes ini bukan merupakan andaian atau akademik, kerana ugutan defendan-defendan untuk menguatkuasakan perintah yang dibuat oleh MR adalah benar. Oleh itu, mahkamah ini membenarkan permohonan ini dengan kos sebanyak RM5,000 dan kos sedemikian ditolak dengan apa yang diberikan sebagai kos oleh perintah yang dibuat oleh MR (lihat perenggan 22 & 25).]

Notes

For cases on application for declaration, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2519–2551.

For cases on costs, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2046–2450.

For cases on judgment and orders, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4449–4759.

TJ Lee (Zairina Loh & Wong) for the plaintiff.
Hariharan Kuppusamy (Hariharan Mohanna & Co) for the defendants.

Zabariah Mohd Yusuf JC:

[1] Enclosure 3 is the plaintiff's originating summons for a declaration that

the plaintiff had complied with the Court of Appeal's order dated 11 August 2011 and an injunction retraining the defendants from proceeding with execution proceedings or filing a winding up petition against the plaintiff.

BACKGROUND

[2] On 11 August 2011, the Court of Appeal dismissed the plaintiff's appeal against the decision of the sessions court for summary judgment with costs of RM5,000 to be paid to the defendants.

[3] Subsequently the plaintiff issued a cheque in the sum of RM5000 pursuant to the order of the Court of Appeal, in favour of both of the defendants. This cheque was forwarded the defendants' solicitor on 2 November 2011. However, the plaintiff's solicitor received a letter from the defendants' solicitor dated 9 November 2011 returning the said cheque and requesting that the plaintiff issued out another cheque under the name of the defendants' solicitors firm's name.

[4] On 15 November 2011, the plaintiff's solicitor informed the defendants' solicitor that the plaintiff is not agreeable to issue another cheque in the name of the defendants solicitor firm's name.

[5] On 16 November 2011, the defendants' solicitor issued out a notice to the plaintiff's solicitor that if the plaintiff failed to issue the cheque under the defendants solicitor's name within 24 hours from 16 November 2011, the defendants will enforce the judgment against the plaintiff.

[6] On 17 November 2011 the plaintiff's solicitor had responded to the defendants solicitor by enclosing the said cheque as payment for the said costs in accordance to the order of the Court of Appeal.

[7] The plaintiff states that it has complied with the Court of Appeal order by issuing the cheque under the defendants' name.

[8] The defendant on the other hand alleged that the Court of Appeal's order did not specifically order to whom the cost should be paid, hence it can either be in the name of the defendants or the defendants solicitor. If only the plaintiff follow the instruction of the defendants to issue the cheque under the defendants' name, the defendant will not issue the enforcement notice against the plaintiff.

THE COURT'S FINDINGS

[9] The issue is whether the plaintiff had complied with the Court of Appeal order dated 11 August 2011 with regards to the costs to be paid to the defendants.

[10] Accordingly, the plaintiff had paid the costs as ordered under the joint names of the defendants.

[11] The defendants however issued a letter dated 9 November 2011 requesting that the cheques which was issued by the plaintiff in their joint names be cancelled and a fresh cheque be made to their solicitors name. Refer to encl 2 ie the plaintiff's affidavit in support in exh LTJ4 which is a letter at the second para where the defendants' solicitor wrote. The plaintiff however refused to agree to such an arrangement.

[12] Vide letter in exh LTJ6, the plaintiff's solicitor had asked that the defendants to come to collect the cheque which they had returned.

[13] After the plaintiff issued the letter, the defendants responded where the defendants' solicitor wrote informing that their client issued an authorisation and in the event they do not received the cheque they shall enforce the order against the plaintiff.

[14] Essentially there was a threat to enforce the order against the plaintiff.

[15] The plaintiff had written back to the defendants stating that the Court Of Appeal order states that costs is to be paid to the defendants and accordingly the plaintiff had complied with the same and that the defendants were to withdraw their letter failing which the plaintiff will file for an injunction. Hence the plaintiff forwarded the cheque to the defendants for the second time.

[16] The defendants returned back the cheque to the plaintiff again. Their letter is in encl 9 at exh NP2. Now the defendants' solicitor wrote saying that their client do not have a joint account.

[17] These facts are not in dispute.

[18] Clearly the plaintiff has complied with the order of the Court of Appeal. For the defendant to instruct the plaintiff to make payment to the defendants in the name of the defendants' solicitor was a mere request. It is subject to the goodwill between parties and whether the plaintiff will accede to the same. In the event that request is not agreeable to the plaintiff, especially since the plaintiff had already issued out a cheque in the joint names of the defendants, it is not the for defendants to issue threats to the plaintiff in the event such a request is not met with by the plaintiff.

[19] The fact that the defendants do not have a joint account only came much later. Hence this seems to be an afterthought on the part of the defendants.

[20] In any event the fact the defendants do not have a joint account is not the concern of the plaintiff. That could easily be remedied by the defendants opening one with the bank.

[21] It was submitted by the defendants that in granting a declaratory order, the court has a discretion and it must relates to a declaration of certain rights and not something which is hypothetical or of academic interest. The defendant further submits that the plaintiff kept on saying that the costs have been paid when actually they have not.

[22] I have no quarrel with the principles in granting declaratory orders, however, what the plaintiff is seeking herein is for an order that the fact of the issuance of the cheque in the joint names of the defendants is in compliance with the order of the Court of Appeal dated 11 August 2011. In view of the dispute between the plaintiff and the defendants with regards to the payment of costs and also the letter of the defendants' solicitor in exh LTJ7 of encl 2 (which states that they will enforce the order against the plaintiff in the event payment is not made as requested), clearly the declaratory order sought for herein by the plaintiffs is not hypothetical nor academic. The threat of enforcing the order is real.

[23] It is pertinent to note that the order of the Court of Appeal was 'appeal dismissed with costs' ie costs was to the defendants.

[24] The plaintiff had made payment via cheque in the joint names of the defendants, which is not contrary to the Court of Appeal order. Even if the payment was made to the defendants' solicitors firm's name, as requested, that too would not have been contrary to the Court of Appeal order. However since the cheque had been made out in the joint names of the defendants, that is in compliance to the Court of Appeal order. Therefore it is wrong for the defendants' counsel to say in his submission that the plaintiff has not paid the costs that was ordered by the Court of Appeal. It was paid by the plaintiff, but not in the manner as the defendants would have wished. The defendants could have indicated earlier to the plaintiffs before the cheque was issued by the plaintiff, however since the cheque had been issued the defendants will have to be satisfied that the costs have been paid.

[25] Therefore the application by the plaintiff in encl 1 is allowed with costs

of RM5,000 and such costs be set off with what was granted as costs by the Court of Appeal order dated 11 August 2011.

Application allowed with costs of RM5,000.

Reported by Kohila Nesan